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# When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation

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# When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation

William G. Childs\*

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Protective orders are commonplace in civil litigation, with trade secrets, privileged communications, and the like protected from public disclosure. In most cases, the protective orders are

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I wrote about many of the issues discussed herein on the *TortsProf Blog*, <http://lawprofessors.typepad.com/tortsprof/>, and I will continue to provide related discussion there.

I spend a small amount of time as a consultant to pharmaceutical clients in mass tort litigation. I am not involved in any of the cases discussed herein, with the exception of the Baycol litigation referenced briefly (in which I represented Bayer), though various clients have at times been adverse to some attorneys and experts mentioned, including the Lanier Firm and David Egilman. The views here may not be my clients'; they have had no involvement in this Article's preparation.

Of course, any errors are mine alone. As always, I thank my family—Dena, Ella, and Liam.

individualized and discrete, with each document evaluated separately.

In mass torts, protective orders are a different beast. When litigants (mostly defendants) are producing large numbers of documents, they typically agree to a blanket protective order in advance, with the confidentiality of documents being designated by the producing party without document-by-document evaluation by the court. Such orders ordinarily permit the challenge of the confidentiality designations, but those challenges are relatively rare. In such cases, then, the confidentiality of the documents during the discovery process is largely within the control of the producing party. If the cases reach trial, very few if any documents used at trial are kept within the protective order, as the presumption for public access shifts to being very strong at that stage.

The parties agree to such orders for two primary reasons. First, it is a practical way to deal with the sheer volume of exhibits and the fact that many of the documents are legitimately secret—manufacturing techniques, for instance, in pharmaceutical cases. Second, maintaining defendants’ “bad documents” in secrecy provides leverage for plaintiffs in negotiating settlements short of trial, since settlement will theoretically prevent the documents from becoming public. Similarly, leaked documents can be used to create embarrassment and concomitant pressure on defendants (especially those that are publicly traded) to settle cases or to generate media attention that will recruit additional potential clients.

Many papers address the question of the appropriate use of protective orders dealing with the issues described above. The scholarship focuses on the proper balance for the tort system to strike between its role as a means for resolving disputes and its potential role as a means for obtaining information about the conduct of the parties, especially as that conduct affects public health.<sup>1</sup>

This Article is not a fundamental challenge to the approach discussed and suggested by those papers. Instead, I address that scholarship initially to establish a foundational point: *Most* protective orders in mass torts have been appropriate, and *most* documents presently designated as confidential have been properly designated, at least under the policies that have been established to date. Put another way, I start with the notion that protective orders have value

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1. See *infra* Part I.

and that there are reasons to try to prevent their regular and notorious violation. At the same time, I recognize that the orders have been abused occasionally and perhaps even regularly. On that foundation, I explore trends in protective order practice, focusing on the changes effected by the rise of electronic communications, and addressing two impacts in particular.

First, as set forth below, Internet and other new technologies have dramatically increased the volume of documents to be produced by parties in litigation, in turn increasing the costs and efforts expended in the document designation process. Those increased costs may result in a stronger probability of erroneous designation of documents as confidential, whether intentionally erroneous or not.

A second, and likely more important, impact of electronic communications is what happens when documents are disclosed contrary to the protective order—intentionally or not. As recently as a decade ago, parties and courts might have realistically hoped to recover leaked confidential documents that were disclosed in violation of a protective order without those documents becoming generally available. Today, in any case that has attracted public attention, the odds of such recovery are vanishingly small. As the Article's title suggests, the bell can simply not be unrung.<sup>2</sup>

These changes suggest that a reevaluation of protective orders may be appropriate, and a change in courts' approaches to protective order violations—whether in improper designation or improper disclosure—may be appropriate as well. Because of the reality changes outlined above, the balance struck may need to be changed. Historically, violations of protective orders have been a relatively low priority for the courts; the people involved receive minor or no sanctions for their actions. Because the stakes are now higher, I argue, the courts should be more open to serious punishments for violations of protective orders (of any sort), and should be more precise in laying out the orders in the first place. In short, the courts should be much more focused on preventing leaks before they occur, through deterrence and more precise protective

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2. Tom Zeller Jr., *Documents Borne by Winds of Free Speech*, N.Y. TIMES, Jan. 15, 2007, at C3 (quoting William G. Childs, *Judge Tries to Unring Bell Hanging Around Neck of Horse Already Out of Barn Being Carried on Ship That Has Sailed*, TORTSPROF BLOG, Dec. 20, 2006, [http://lawprofessors.typepad.com/tortsp/2006/12/judge\\_tries\\_to.htm](http://lawprofessors.typepad.com/tortsp/2006/12/judge_tries_to.htm)).

orders, rather than remediation afterwards, which is almost entirely pointless to even attempt.

I proceed in three Parts. In Part I, I briefly provide an overview of the development of protective orders, particularly in mass torts. In this Part, I describe the overall state of scholarship and litigation relating to protective orders, in particular the balance various writers have proposed between the parties' legitimate privacy and confidentiality interests versus the public interest in information-spreading. I also describe some leaks in past cases.

In Part II, I explore in some detail a recent case, the Zyprexa litigation, that exemplifies most of the document disclosure issues through a modern lens. This case, I argue, may suggest the future of protective order violations, and should therefore be considered carefully.<sup>3</sup> In that case, a paid plaintiffs' expert, a lawyer not involved in the principal litigation, and a reporter from the *New York Times* worked together in what a federal judge described as a "conspiracy" to publicize documents previously under seal.<sup>4</sup> In this Part, I will describe the events in some detail, addressing the potential overdesignating of documents by the defendant as well as the process through which those documents became readily available, even as the judge sought their return. As will become clear, the use of anonymizing technologies—and the fundamental ease of distributing documents electronically—made that effort fruitless.

Finally, in Part III, I provide some suggestions for how litigants and courts should change the way they act to deal with the new world in which they are acting. To date, most protective orders still look in the main as they did twenty or thirty years ago, and efforts to enforce them are similarly static. Here, I suggest that today's world mandates a shift in approach, and that business as usual is no longer a reasonable option for a number of reasons. I then urge greater penalties for violations of protective orders on any side, including the possibility of holding attorneys directly responsible in limited circumstances for the actions of their clients or

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3. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007), is only an example, and I note other recent protective order violations as well. That said, the *Zyprexa Injunction* case is the best documented and best represents the phenomena I am focusing on, and so it receives, by far, the most detailed discussion.

4. *Id.* at 395.

retained experts. I also suggest that protective orders should be more readily subject to challenge by third parties. Finally, I argue that protective orders should be more comprehensive and specific.

## I. HISTORY

What happens in court is presumptively public.<sup>5</sup> Once a document or an excerpt of testimony is “used in the proceeding,”<sup>6</sup> a presumption of access attaches. A tremendous number of documents and many hours of testimony are, however, never used in an action, whether a mass tort or otherwise. As to those documents, the right of access, if it exists at all, is much less clear.<sup>7</sup> And it is as to those documents that the protective orders discussed in this Article apply.

Protective orders—particularly in mass torts—are designed to facilitate the discovery and litigation process while protecting the parties.<sup>8</sup> Federal courts have the authority to issue protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. Typically, such orders are sought as to a particular document or set of documents, or to the contents of a particular deposition.<sup>9</sup> In mass torts, however, it is common for parties to agree to prospective protective orders, permitting the producing party to designate documents as subject to the protective order without the court ruling on them individually.<sup>10</sup>

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5. E.g., Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL’Y 53, 53 (2000) (“The assumption that all aspects of court-centered litigation are out in the open, on the record, and fully explained by the court is an important foundation for the confidence our public has in its courts.”).

6. FED. R. CIV. P. 5(d). Rule 5(d), amended in 2001, directs courts to refuse filing discovery materials until “used in the action.” Once so filed, they are much more likely to be deemed public. Without being filed, it is difficult for the public to access them. See generally Weinstein, *supra* note 5, at 56–58 (describing the common practice of secrecy agreements in case settlements).

7. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 2042, at 544–46 (2d ed. 1994) (stating that Rule 26(c)(6) gives courts the ability to order that depositions and answers to interrogatories be kept sealed).

8. See *id.* § 2035 (stating that Rule 26(c) offers protection to parties and witnesses during discovery).

9. *Id.* § 2043.

10. *Id.* § 2035, at 476–77; Anita Hotchkiss & Diane M. Fleming, *Protecting and Enforcing Protective Orders: Easier Said Than Done*, 71 DEF. COUNS. J. 161,

The reasons are, presumably, obvious: the number of claims is not the only thing that is massive about mass torts. When the subject matter of a suit is a pharmaceutical product, a medical device, or a consumer product, the defendant has likely created, at a minimum, hundreds of thousands, and more likely millions or even tens of millions, of pages of documents arguably responsive to discovery requests.<sup>11</sup> It is no great surprise that many documents are asserted to be under a protective order, given the broad subject matter routinely alleged to constitute trade secrets—ranging from manufacturing processes to privileged communications to marketing strategies.

The advantages of protective orders should not be overlooked. As Arthur Miller notes, “Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door.”<sup>12</sup> Unfettered distribution of otherwise private materials has its own harm (even if the information has no independent value) increased, as he again notes, “when the information is disclosed to the media, competitors, political adversaries, and even curious members of the public.”<sup>13</sup>

The more obvious reason for the use of protective orders is, of course, to protect the litigants’ property rights. Again quoting Miller:

In today’s business world, commercial information often has a value that is tangible enough to be bought and sold for huge sums of money, and extraordinary efforts are expended to control it and to maintain its security and confidentiality. It is not surprising, then, that our legal system considers information to be property.<sup>14</sup>

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161 (2004) (discussing the potential for protective orders to exclude confidential information). Though the Hotchkiss article is introduced with an assertion that “[the] harsh truth is that the era of broad, agreed-upon protective orders covering virtually every document is gone,” *id.*, such orders remain common at least in mass tort litigation, for reasons described in the text.

11. See Weinstein, *supra* note 5, at 53–54 (referring to the changes wrought in data collection by Internet and e-mail technologies).

12. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 466 (1991).

13. *Id.*

14. *Id.* at 467–68.

Such information can range from the classic trade secret (e.g., the formula for Coke<sup>15</sup>) to perhaps the less obvious but still-protected marketing plans, market share data, and the like. It can, further, include information that may also be relevant to public safety questions: company scientists speculating about how a comparative safety test might end up, internal analyses of adverse event reports, and so on.<sup>16</sup>

Perhaps more problematically, there are other reasons for the extensive use of protective orders in mass tort cases, and for plaintiffs sometimes not pushing as hard for disclosure as one might expect. As has been described by others, the possibility of keeping documents secret—both “bad documents” and marginally confidential but valuable documents—no doubt can affect the ability of plaintiffs to settle cases and the amount for which cases will settle.<sup>17</sup> Put more bluntly, defendants will pay more to keep bad documents secret. As most commentators observing this practice note, to the extent the litigation system’s public nature is important for public health purposes, the practice of “buying secrecy” is, at a minimum, worth careful consideration.<sup>18</sup>

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15. Miller, indeed, discusses a labor dispute involving Coca-Cola, where, even with a stringent protective order, the company apparently chose to settle the case rather than disclose the formula. *Id.* at 469–70.

16. To emphasize, the fact that such information is *potentially* worthy of protection does not mean that it is, or that I think it should be, protected in all cases.

17. See, e.g., Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL’Y L. & ETHICS 587, 665 (2005) (“Plaintiffs may accede to such secrecy provisions in return for a higher settlement payment.”); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 512 (1994) (“Plaintiffs’ attorneys’ threats to reveal [‘smoking gun’ documents] can be a powerful lever for higher settlements.”); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1, 20 (2001) (“[D]efendant will agree to a settlement in a completely meritless case because the jurisdiction is pro-plaintiff . . . but the defendant may not wish to provide a basis for national settlement before more neutral judges and juries.”); Miller, *supra* note 12, at 473 (“In the most extreme cases, plaintiffs seek an order compelling disclosure of commercially valuable data as a ‘bludgeon’ to force a favorable settlement.”).

18. See Weinstein, *supra* note 5, at 53 (“Any sacrifice of confidence by shuttering off part of the sunshine through secrecy orders needs careful consideration and justification.”); Struve, *supra* note 17, at 665 (“Commentators have raised concerns that secrecy provisions may prevent the disclosure to the



That practice is obviously limited in large part to cases where the defendant intends not to try any cases, i.e., where the parties agree to settle or otherwise dispose of all cases outside of the

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FDA of information concerning product safety.”). Of course how problematic one finds this practice depends on how one prioritizes the goals of litigation. If the sole goal is the resolution of conflicts, this practice is largely reasonable. However, as Struve argues, the tort system is an important part of the public health system, and this secrecy makes unavailable potentially important sources of data. Struve, *supra* note 17, at 665–66. As previously noted, this Article does not focus on that important discussion.

It is worth observing tangentially that often the purported “smoking gun” documents released are in fact either less compelling than represented or at most only part of the story. In the documents released by Dr. Egilman in the *Zyprexa Injunction* case, for instance, the documents can be generally categorized as relating to potential off-label marketing of the drug and as relating to side effects, including diabetes. The documents relating to off-label marketing are certainly of interest, though they are largely only suggestive of an interest in such marketing rather than evidence that Lilly in fact engaged in it. It is not generally unlawful for a company to track off-label use (just as it is not unlawful for a doctor to prescribe a medicine off-label); nor is it unlawful to hope for such use. Indeed, certain actions that may encourage off-label use are permitted. And, of course, the off-label marketing documents are, in most cases, not directly relevant to most of the personal injury suits, though they are of tremendous interest to state and third-party payor litigants.

The documents relating to the safety of the medicine are facially more concerning, but in those documents, again, there is less than meets the eye. A majority of the documents relate to analyses of spontaneous adverse event reports—reports that are made voluntarily by anyone who wishes to make them. Companies are encouraged to track and analyze the reports carefully, but epidemiologists warn against relying on them to establish rates, especially comparative rates, of side effects, due to many confounders in the evidence. I address the actual materiality of the leaked documents in more detail *infra*.

An additional factor is the difficulty of using this strategy, either by plaintiffs or defendants. Once a matter comes to open court, of course, there is a strong presumption of public access. See Miller, *supra* note 12, at 429 (discussing the historical roots of the right of access and the modern movement towards public access of information). In modern mass torts, at least one case almost always goes to trial, and thus at least some key documents become public. That said, in the primary case discussed below, the *Zyprexa* litigation, there has not yet been a trial, and in cases where there are trials, the leak of documents can have its own pernicious effects as discussed in the text.

Finally, a pragmatic note: some practicing mass tort lawyers who have reviewed this Article suggest that once a case actually gets to trial, plaintiffs’ lawyers are not really focusing on getting the bad documents into the public domain. That is, of course, true, and some number of documents will not in fact be introduced into evidence in any given trial. But enough will to make it worth something to avoid a trial and their release.

courtroom. This is because at least some number of the critical documents will become public at any trial that takes place, and so it makes little sense to pay a premium to avoid the release of documents that will become public anyway. But leverage for greater settlements is not the only potential way that the abuse of protective orders can be used to create undue pressure. Selective leaking of documents to the media can create additional pressure (particularly for publicly-traded companies) to settle cases rather than face the possibility of a trial. In one case, the lawyer trying the first of many cases acknowledged that he was doing just that: “‘I was feeding a lot of information to European and U.S. papers,’ [Mikal Watts] says. ‘It was part of my strategy to affect the stock price, which I was very successful at.’”<sup>19</sup>

Many judges, lawyers, and scholars have addressed the potential advantages and drawbacks to secrecy in litigation. In what

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19. Monica Langley, *Courtroom Triage: Bayer, Pressed to Settle a Flood of Suits Over Drug, Fights Back*, WALL ST. J., May 3, 2004, at A1. The main coverage I am aware of was in the *New York Times*, with an article coauthored by Alex Berenson, who became a central player (and, according to Judge Weinstein, a conspirator) in the *Zyprexa Injunction* case discussed below. Melody Petersen & Alex Berenson, *Papers Indicate That Bayer Knew Of Dangers of Its Cholesterol Drug*, N.Y. TIMES, Feb. 22, 2003, at A5. That story cites documents made public by plaintiffs’ attorneys but does not make clear whether they were still under the protective order. *Id.* Many of them, given the timeline, had perhaps been used in open court in summary judgment briefing. Thus, it is not certain whether they were in fact leaked or simply released—but the strategy reflected is the same in any event, with documents being used outside of a situation where they can be contextualized. As noted *supra*, I represented Bayer in the Baycol litigation.

In one sense, the *Zyprexa Injunction* case is atypical. The documents were leaked even though the defendant is settling (at least to date) every case, and thus, one could assume, paying a premium for ongoing secrecy. That would suggest that the plaintiffs do not, in fact, have an incentive to leak the documents, and indeed should oppose such leaks—and in fact, as noted below, the MDL steering committee joined in the defendants’ efforts to retrieve the documents. (It is possible, however, that the enormous press given to the leaked documents could create new potential clients, thus benefiting the plaintiffs’ counsel.)

In addition to the examples provided in the text of people interested in sealing or revealing documents in litigation, other players include business competitors; other plaintiffs’ attorneys seeking to enter the litigation; already-involved plaintiffs’ attorneys seeking additional clients through receiving press; third-party litigants (i.e., shareholders, attorneys general, third-party payors, and the like); non-profit entities like Mr. Gottstein’s; regulators; researchers; judges; academics; and so on. I thank Judge Weinstein for suggesting these additional members of the typology of interested parties.

is a useful summary of most of the arguments before and since, Arthur Miller wrote, in 1991, of attacks on protective orders that arose subsequent to various court challenges to the orders, in particular *Seattle Times Co. v. Rhinehart*.<sup>20</sup> Miller wrote that the Association of Trial Lawyers of America (now the American Association for Justice (“AAJ”)) was then “press[ing] for legislation prohibiting courts from entering orders that would have the effect of ‘concealing public hazards’” and had “sought a presumptive right of access to all information produced in litigation, including everything exchanged in discovery but not used at trial, as well as the contents of settlement agreements.”<sup>21</sup>

Miller evaluated the benefits of major changes in protective order practice (efficiency, public health) along with the downsides (complicating discovery, increased demands on judicial resources).<sup>22</sup> Finding the alleged harms caused by secrecy to be largely overstated and the benefits of the system as it stood to be significant, he ultimately concluded that major changes were not appropriate in 1991, and indeed major changes have not taken place in the ensuing sixteen-plus years.<sup>23</sup>

Others have addressed the same questions and come out in a variety of ways. Judge Joseph F. Anderson Jr., Chief Judge of the United States District Court for the District of South Carolina, made his views clear in the title of a symposium essay, “Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy.”<sup>24</sup> His essay focuses largely on the related but different question of sealed settlements and closed courtrooms (as did the symposium in which it was published), but it also addresses

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20. Miller, *supra* note 12; *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

21. Miller, *supra* note 12, at 442.

22. *Id.* at 477–89.

23. *Id.* at 502. Laurie Doré in 1999 provided another extensive and thorough exploration of the competing interests in stipulated protective orders. Laurie Kratky Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 324–71 (1999). She concluded that stipulated protective orders “serve valuable public, as well as private, interests.” *Id.* at 370. She notes, however, that courts should remain cognizant of their duty to supervise discovery and that “[i]n some instances, broader public interests may well override the litigants’ mutual desire for secrecy.” *Id.* at 371.

24. Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004).

secrecy in connection with discovery materials—though only in the context of the materials being used in the action, either in connection with trial or a motion.<sup>25</sup> As he points out, significant changes have taken place in the form of “sunshine provisions”—provisions that create (in typical examples) a presumption of access to court records.<sup>26</sup> But those provisions do not, with few, if any exceptions, change the practice in connection with protective orders—because (in federal court and some state courts) discovery materials are not court records.

Of particular interest (not least because he is the judge overseeing the Zyprexa multi-district litigation discussed below) are the views of Judge Jack Weinstein of the Eastern District of New York. As early as 1994, Judge Weinstein wrote of secrecy agreements in his seminal *Individual Justice in Mass Tort Litigation*.<sup>27</sup> He succinctly summarized the interests involved:

The most common form of secrecy utilized by the defendant in a mass tort case is the protective order. [Rule 26(c)] permits . . . a protective order . . . upon a showing of “good cause.” This provision does not specifically refer to the public interest. Rather, it applies primarily to commercially sensitive information that might cause the defendant some competitive harm. Defendants want to avoid disclosure of damaging information. Plaintiffs desire to use this damaging information as a negotiation tool for larger settlements for clients in the future.

“Smoking gun” documents are the most damaging form of this information. They indicate defendants knew of the danger but suppressed the information.<sup>28</sup>

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25. *Id.* at 719–20 (“Although these [stipulated protective] orders often provide for ‘blanket’ confidentiality of all documents produced, no public interest is implicated because discovery is not filed with the court until it is necessary to do so in connection with a motion or a trial.”).

26. *See id.* at 725–26 & n.40 (cataloging “sunshine provisions”).

27. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995). A shorter version of much of the book was published in Weinstein, *supra* note 17.

28. WEINSTEIN, *supra* note 27, at 67 (citations omitted).

Judge Weinstein further acknowledged the point, most often made by defendants, that these supposed “smoking guns” sometimes are “shown to be neutral or even favorable to the defendant,” but that providing the necessary context is difficult and time-consuming.<sup>29</sup> After discussing the various interests, Judge Weinstein concluded:

Protective orders may have a legitimate role when there is no public impact or when true trade secrets are involved. But we can strike a fairer balance between privacy interests of corporations and the health and safety of the public. A publicly maintained legal system ought not protect those who engage in misconduct, conceal the cause of injury from the victims, or render potential victims vulnerable. Moreover, such secrecy defeats the deterrent function of the justice system.<sup>30</sup>

After noting the fact that judges might be too inclined to approve secrecy agreements (due to a desire to clear calendars), he argues for a national approach that would be less biased in favor of granting broad protective orders.<sup>31</sup>

Judge Weinstein returned to the issue in an essay in 2000, noting that changes were taking place due to “the enormous increase in data collected and available through computers, the ease of widespread transmission via the internet and e-mail,” and other technological phenomena.<sup>32</sup> In discussing protective orders, he repeated verbatim much of the description above, and noted his practice of approving sealing orders only with the addition that it could be judicially modified if necessary for the “public interest.”<sup>33</sup> As earlier, he argues for a balancing test, “weighing the interests of the parties in keeping the information confidential against the interests of the public in publishing it.”<sup>34</sup> His default view is clearly in favor of disclosure: “Each case is different, but, in general, where there is a doubt, secrecy should be rejected. Any secrecy agreement

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29. *Id.* at 68.

30. *Id.* at 70 (citations omitted).

31. *Id.* at 71.

32. Weinstein, *supra* note 5, at 54.

33. *Id.* at 61.

34. *Id.* at 58.

should have a judicial imprimatur, with the discretion in the court to modify the agreement on application of a party to the litigation or of a third party.”<sup>35</sup>

A year later, Judge Weinstein returned to the topic in an article co-authored with his law clerk.<sup>36</sup> He again repeated verbatim much of the same introductory material, but expanded his views as to mass tort litigation in particular:

Because mass tort cases are similar in some respects to institutional reform through legislation or private attorney general litigation in their impact on society, the interests of individual members of the community must sometimes give way to the interests of the community as a whole. Judges must consider the need for a broad-based public inquiry in mass tort cases, especially since government regulatory systems designed to protect the public are often inadequate. They must weigh the potential interests of litigants in other lawsuits, the needs of regulatory agencies to have access to information, the interests of future plaintiffs, and the concerns of public interest groups, which includes the concerns of the scientific community, for openness.<sup>37</sup>

Even with this more explicit concern about secrecy in mass torts, Judge Weinstein concludes with his same recommendation—that judges note that protective orders can be modified when in the public interest, along with some encouragement for third-party intervention in protective order disputes.<sup>38</sup>

This much is not new. The document productions in mass tort litigation have been sufficiently large to justify umbrella protective orders for years, and some numbers of documents have been leaked from time to time for the same period. And, of course, scholars, lawyers, judges, and others have argued that protective orders fail to strike the proper balance as to the public interest, and

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35. *Id.* at 65.

36. Weinstein & Wimberly, *supra* note 17.

37. *Id.* at 21–22 (footnotes omitted).

38. *Id.* at 18–24.

have urged changes in the law, but the applicable law has not changed appreciably.

What is new is what happens after those leaks. To see how that has changed, we turn to *Zyprexa*.

## II. THE ZYPREXA CASE

Zyprexa (the brand name for olanzapine) is what is known as an atypical antipsychotic medication. It was approved in 1996 and is marketed by Eli Lilly & Company (“Lilly”), for which it, at this writing, represents, by a substantial margin, its most successful product in terms of annual sales.<sup>39</sup> It is approved in the United States for the treatment of schizophrenia and bipolar disorder, and agitation associated with both of those ailments.<sup>40</sup>

At least 30,000 personal injury lawsuits have been filed against Lilly relating to alleged injuries claimed to be caused by Zyprexa.<sup>41</sup> Though the allegations vary, the core claims asserted by plaintiffs relate to obesity, weight gain, and diabetes (and insufficient warnings thereof).<sup>42</sup> Plaintiffs (including third-party payors) also allege that Lilly improperly marketed Zyprexa “off-label” (i.e., for indications for which it is not approved) as a treatment for dementia and related symptoms.<sup>43</sup> No cases have gone to trial. As of its 2006

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39. ELI LILLY & CO., 2006 ANNUAL REPORT, NOTICE OF 2007 ANNUAL MEETING AND PROXY STATEMENT 12 (2007) [hereinafter 2006 ANNUAL REPORT], available at [http://www.lilly.com/investor/annual\\_report/lillyar2006.pdf](http://www.lilly.com/investor/annual_report/lillyar2006.pdf).

40. PACKAGE INSERT FOR OLANZAPINE 4–7 (2007), available at <http://pi.lilly.com/us/zyprexa-pi.pdf>.

41. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 391 (E.D.N.Y. 2007).

42. *Id.*

43. See *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1956, 05-CV-4115, 05-CV-2948, slip op. at 2–3. (E.D.N.Y. June 28, 2007) (order denying summary judgment), available at <http://psychrights.org/states/Alaska/CaseXX/EilLilly/zyprexa-order-6-28-07.pdf>. Indeed, some of the state investigations and suits have followed the *New York Times* stories that were based on the leaked documents discussed *infra*. See Alex Berenson, *Lilly Considers \$1 Billion Fine to Settle Cases*, N.Y. TIMES, Jan. 31, 2008, at A1 (reporting on possible \$1 billion settlement with state and federal governments for violating laws governing how drugs can be promoted); Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use*, N.Y. TIMES, Dec. 18, 2006, at A1, (reporting, based on leaked documents, that Lilly promoted Zyprexa as a treatment for conditions other than bipolar disorder or schizophrenia). The off-label marketing claims do not

Annual Report, Lilly has instead settled the substantial majority of the Zyprexa cases, with charges of over \$1.5 billion.<sup>44</sup> Additional settlements have been announced since then.<sup>45</sup>

Millions of pages of documents have been produced by Lilly to the plaintiffs, in both federal and state cases.<sup>46</sup> A presumably smaller number of pages—largely medical records—have been produced by the plaintiffs.<sup>47</sup> Many of those pages are stamped under the Protective Order, “Confidential—Subject to Protective Order.”<sup>48</sup>

Thousands of pages of documents so stamped ended up in the hands of reporters and activists, available within minutes to anyone who wanted to find them, in what the trial judge concluded was a violation of the protective order.<sup>49</sup> Those documents remain readily available online, as discussed below, despite the judge’s conclusion that the documents were improperly leaked and the injunction of a number of people who had been distributing them.<sup>50</sup>

The Zyprexa experience provides a useful example of the modern state of play in mass torts and protective orders, and it is therefore worth describing in detail.

#### A. *The Protective Order*

The “Protective Order” referenced is an August 9, 2004, order issued by Judge Weinstein, also referred to as “Case Management Order No. 3.”<sup>51</sup> That Order was issued, by its terms, to

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necessarily relate to the injury claims, except for plaintiffs who can allege that they should not have received Zyprexa at all *and* that the product caused harm.

44. See 2006 ANNUAL REPORT, *supra* note 39, at 11 (reporting \$1.07 billion of pre-tax settlement in second quarter 2005 and \$500 million in fourth quarter report).

45. Alex Berenson, *Lilly Settles With 18,000 Over Zyprexa*, N.Y. TIMES, Jan. 7, 2007, at C1.

46. *Zyprexa Injunction*, 474 F. Supp. 2d at 392 (noting that “millions of documents” were obtained by plaintiffs’ counsel under discovery order requiring records be sealed on consent of the parties).

47. *Id.*

48. *Id.*

49. *Id.* at 422–23.

50. See *infra* Part II.C.

51. *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2004 WL 3520247, at \*1 (E.D.N.Y. Aug. 9, 2004) (protective order). Judge Weinstein is the judge supervising the Multi-District Litigation; all federal cases brought relating to Zyprexa have been transferred to him for pre-trial discovery purposes.



“expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled.”<sup>52</sup> The Order provides that the producing party can designate any document as confidential if that party “in good faith believes [the document] is properly protected under Federal Rule of Civil Procedure 26(c)(7).”<sup>53</sup> “Confidential” documents can be disclosed to various people employed by involved law firms, court officials, experts, and similar people who have signed an “Endorsement of Protective Order,” which commits the party to maintain the documents’ confidentiality under the terms of the Protective Order and subjects the signor to the court’s jurisdiction.<sup>54</sup> The Order also provides that a party or intervenor can dispute the confidentiality of documents, with the designating party required to respond within twenty days of notification; if the parties cannot resolve the dispute amicably, the designating party is to file a motion for a protective order within forty-five days, or longer if so agreed by the parties.<sup>55</sup> Finally, and importantly for the dispute in this case, the Protective Order provides for a procedure to follow if designated documents are subpoenaed by courts or agencies.<sup>56</sup> The person who receives the subpoena is required to notify the designating party of the details of the subpoena; “In no event shall confidential documents be produced prior to the receipt of written notice by the designating party and a reasonable opportunity to object.”<sup>57</sup>

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52. *Id.*

53. *Id.*

54. *Id.* at \*2–3.

55. *Id.* at \*5. This provision, as discussed *infra*, became one basis for claiming that previously confidential documents had become public.

56. *Id.* at \*6.

57. *Id.* Mr. Gottstein has pointed out to me via an e-mail that a 2004 draft of the Protective Order provided for a ten-day period after notice to the designating party, after which production would be permitted. E-mail from James Gottstein to author (May 23, 2007) (on file with author) (citing Letter from Christopher Seeger to Magistrate Judge A. Simon Chrein at 17, *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596 (E.D.N.Y. Jul. 16, 2004)). This timeline was changed to require “prompt” notice to the designating party and to preclude production until after a “reasonable opportunity” to object. *In re Zyprexa Prod. Liab. Litig.*, No. MDL 1596, 2004 WL 3520247, at \*6 (E.D.N.Y. August 9, 2004).

B. *Obtaining the Documents*

In late 2006, however, while the litigation seemed to be settling down, the *New York Times* published a series of articles based on thousands of pages of documents it had received from an Alaska lawyer, James Gottstein.<sup>58</sup> Gottstein was not involved in the tort litigation; he works against alleged forced medications of mentally ill patients in that state. The documents he obtained, as described below, were from the production in the tort litigation and were (for the most part) designated as confidential under the Protective Order. In addition to the *New York Times* reporter (Alex Berenson), Gottstein distributed the documents electronically to roughly eighteen other people or organizations, some of whom posted the documents online.<sup>59</sup> From those posts, many copies of the documents were distributed by means of various technologies that provide anonymity. Indeed, less than a month after the articles ran in the *Times*, and after efforts by the court to enjoin distribution, I was able to find the documents within nineteen minutes.<sup>60</sup>

In this sub-Part, I lay out the means by which the documents were obtained in some detail. The detail is necessary to explore the range of parties who might have an interest in avoiding or defeating a protective order in today's society, as discussed further below.

Dr. David Egilman, who is at the center of the Zyprexa document leak, is an occupational health specialist and regular plaintiffs' expert witness.<sup>61</sup> The Lanier Law Firm, a high-profile plaintiffs' law firm, hired Egilman in August 2006 to serve as an expert.<sup>62</sup> Not long after, the Lanier firm sent Egilman the Protective Order, asking him to sign the attached Endorsement.<sup>63</sup>

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58. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 392–93 (E.D.N.Y. 2007).

59. The breadth of the document distribution online is discussed in more detail in Part II.C. *infra*.

60. William G. Childs, *Protective Orders and the Internet*, TORTSPROF BLOG, Jan. 8, 2007, [http://lawprofessors.typepad.com/tortspref/2007/01/protective\\_orde.html](http://lawprofessors.typepad.com/tortspref/2007/01/protective_orde.html). I looked again in early July 2007 and found the documents within a similar period of time. The details of the documents' distribution are discussed *infra* Part II.C.

61. He has been identified in cases in which I have been involved as defense counsel, though I have had no interactions with him and have no involvement in the Zyprexa litigation.

62. *Zyprexa Injunction*, 474 F. Supp. 2d at 399.

63. *Id.*

Egilman initially performed a number of edits to the Endorsement, crossing out the sentence that acknowledged that his execution of the Endorsement was a requirement to receive access to the confidential documents and adding a statement that would permit his release of confidential documents if “needed to protect public health.”<sup>64</sup> An attorney at the Lanier firm “conveyed the seriousness” of the Protective Order and told Egilman that the Endorsement was required to be signed if Egilman wished to receive access to the confidential documents.<sup>65</sup>

Thereafter, on November 14, 2006, Egilman signed an Endorsement with only one change, adding “other sworn statements” as a basis for disclosure.<sup>66</sup> Egilman explained to the Lanier attorney that he wanted to be able to cooperate with either the FDA or Congress if subpoenaed.<sup>67</sup> With those changes, which left the fundamental strictures of the Protective Order in place, he then received access to the full database of documents produced by Lilly.<sup>68</sup>

Just two weeks later, Egilman contacted James Gottstein, an attorney in Alaska.<sup>69</sup> Gottstein is the founder of The Law Project for Psychiatric Rights, also known as PsychRights. PsychRights is a non-profit whose mission is “to undertake a coordinated, strategic, legal effort seeking to end the abuses against people diagnosed with mental illness through individual legal representation.”<sup>70</sup> Gottstein does not represent clients in products liability suits and had no prior direct connection to the Zyprexa litigation. His organization’s

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64. *Id.* at 399.

65. *Id.*

66. *Id.* at 400.

67. *Id.* It is worth noting that Dr. Egilman himself has asserted the right against self-incrimination and refused to testify as to these matters, *id.* at 406, and so citations are to the testimony and affidavits of others. Similarly, Alex Berenson of the *New York Times* declined Judge Weinstein’s “invitation” to voluntarily testify about his role in the production and distribution of the documents. *Id.* at 411–12. My interpretation of the facts of what occurred generally tracks that of Judge Weinstein, and as a whole, the facts are not in dispute among the parties.

68. Egilman later said that he sent Mr. Gottstein all of the documents within his possession. As discussed *infra*, he did not state whether he had previously had more documents or had access to more documents.

69. *Id.* at 400.

70. Law Project for Psychiatric Rights, About the Law Project for Psychiatric Rights (Mar. 1, 2008), <http://psychrights.org/aboutus.htm>.

interest is instead on preventing the forced medication of patients with what it describes as “brain damaging psychiatric drugs.”<sup>71</sup>

What happened between Egilman’s execution of the Protective Order Endorsement and his contact of Gottstein is not completely clear, but it seems fairly certain that Egilman contacted *Times* reporter Alex Berenson and suggested that Berenson would be interested in some of the documents Egilman had received under the Protective Order.<sup>72</sup> Recognizing the challenge presented by the Protective Order, Berenson apparently suggested that Egilman contact Gottstein, whom Berenson knew, based on prior contacts, to be interested in psychiatric medication issues.<sup>73</sup> When Egilman contacted him, Gottstein understood it was in an effort to get assistance disseminating documents that were then subject to a Protective Order.<sup>74</sup> In fact, Gottstein requested a copy of the Protective Order, but (per Gottstein’s testimony) Egilman said that Gottstein “didn’t want it” and Gottstein “didn’t push it.”<sup>75</sup> Gottstein testified that Egilman was in some way trying to protect Gottstein: “My kind of sense was that if I didn’t have [the Protective Order], then I wouldn’t be charged with the knowledge of it.”<sup>76</sup> By the end of the phone call, it was clear to Gottstein that he would attempt to find a case in which he could subpoena the documents.<sup>77</sup> Further, it was clear to Gottstein that, at least as far as Egilman was concerned, the purpose of the subpoena was to get the documents distributed to an array of specified individuals, including journalists and staffers from Congress.<sup>78</sup>

Gottstein, as he and Egilman expected, did indeed find a case for which he could issue a subpoena for the documents.<sup>79</sup> He did so,

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71. *Id.*

72. *Zyprexa Injunction*, 474 F. Supp. 2d at 400–01, 403.

73. *Id.* at 400.

74. In Gottstein’s letter to the special master in December of 2006, he wrote that, in the course of the phone call with Egilman, he “learned that [Egilman] had access to secret Eli Lilly documents pertaining to Zyprexa,” suggesting that the phone call was not directed to the document production from the start. Letter from James Gottstein to Special Master Peter H. Woodin (Dec. 17, 2006) (on file with author). The apparent inconsistency is not particularly important for these purposes.

75. *Zyprexa Injunction*, 474 F. Supp. 2d at 401.

76. *Id.*

77. *Id.* at 400–01.

78. *Id.*

79. *Id.* at 401–02.

issuing a subpoena duces tecum dated December 6, 2006, in the case of *In re Guardianship of B.B.*, an Alaska Superior Court proceeding.<sup>80</sup> That subpoena had a return date of December 20, 2006, and included a document request to which the documents Egilman received under the Protective Order would be responsive.<sup>81</sup> Egilman faxed the subpoena to Lilly's general counsel on December 6; he did not directly notify litigation counsel (either for the plaintiffs or the defendant).<sup>82</sup> On December 11, Gottstein served an amended subpoena requesting that Egilman produce the documents "as soon you can."<sup>83</sup> The stated reason for the amended subpoena and the shift in the production date was that Gottstein realized that the deposition was to be by telephone, and so that Egilman would be unable to bring the documents with him to the deposition.<sup>84</sup> Importantly, Egilman did *not* serve this amended subpoena on Lilly (either the General Counsel or litigation counsel), nor did he notify the Lanier firm.<sup>85</sup> This was despite the fact that Gottstein "repeatedly" told Egilman "that he should send the second subpoena to Lilly,"<sup>86</sup> and despite the fact that the Protective Order itself

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80. Subpoena for Taking Deposition to David Egilman, *In re Guardianship of B.B.*, No. 3AN-04-545 P/G (Alaska Super. Ct. Dec. 6, 2006).

81. *Id.* Gottstein acknowledged that the patient "B.B." (referred to in some transcripts as "D.B.") may not have been on Zyprexa. Transcript of Hearing Before Hon. Jack Weinstein at 33, *In re Zyprexa Litig.*, No. MDL 1596 (E.D.N.Y. Jan. 16–17, 2007), *first day available at* <http://psychrights.org/States/Alaska/CaseXX/EilLilly/01-16-07Transcript.txt>, *second day available at* <http://psychrights.org/States/Alaska/CaseXX/EilLilly/01-16-07Transcript.txt>. Given PsychRights's general argument that the risks of psychiatric medications are insufficiently warned-of, and that involuntary treatment with them is inappropriate, I assume he would argue that any evidence of undisclosed risks within the documents would be relevant to the litigation.

82. *See also* Letter from David Egilman to Brewster H. Jamieson (Dec. 15, 2006) (on file with author) (indicating that he found the General Counsel's fax number in a CLE online, but not noting any effort to ask the Lanier Law Firm for contact information for Lilly's litigation counsel). The protective order specifies that the notice is to go to the designating party, so notifying Lilly through its general counsel's office is likely sufficient, even if it might evidence an intent to do the minimum necessary.

83. *Zyprexa Injunction*, 474 F. Supp. 2d at 401.

84. *Id.*

85. *Id.* at 402.

86. *Id.* at 401.

required that the producing party be informed of the date on which production was requested.<sup>87</sup>

Dr. Egilman began sending documents (via FTP transfer) to Gottstein almost immediately, starting on December 12.<sup>88</sup> The next day, Lilly's litigation counsel contacted the Lanier law firm to discuss the pending subpoena—which, as far as Lilly knew, had a return date of December 20. Richard Meadow, an attorney at the Lanier firm, then contacted Egilman. As Meadow testified in a hearing on the matter:

Q: You spoke to Dr. Egilman on December 13, correct?

A: Without looking at it, I believe so, yes.

Q: That was the Wednesday, December 13?

A: Yes.

Q: And you told him not to produce documents requested in this subpoena that had been issued from the State of Alaska?

A: I said don't do anything with the subpoena until you hear from me.

Q: And you did that because you knew there was a process that was being followed under the protective order and that Lilly had already started that process, correct?

A: I had received a phone call from [Lilly lawyer] Andy Rogoff and I told him that I would reach out to Dr. Egilman and tell him not to do anything.

....

Q: And he said -- what did Dr. Egilman say to you?

A: He just said yes, Rick.

Q: And you -- what did you understand that to mean?

A: That he understood that I told him don't do anything. I don't want to read into other than what he said to me.

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87. *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2004 WL 3520247, at \*6 (E.D.N.Y. Aug. 9, 2004).

88. *Zyprexa Injunction*, 474 F. Supp. 2d at 401–03.

Q: Did you later learn that Dr. Egilman had already begun transferring documents to Mr. Gottstein?

A: Yes.<sup>89</sup>

Judge Weinstein concluded that the shift in production date, rather than merely being a necessity for the telephonic deposition, was in fact a “subterfuge.”<sup>90</sup> Gottstein testified that he did not review the documents upon receipt; instead, he immediately began burning multiple copies of the documents to DVDs, distributing them to at least fifteen people, including both reporters and activists.<sup>91</sup> As promised, the documents were delivered to the *New York Times*’s Alex Berenson.

The *New York Times* (the only print publication to which Gottstein provided the documents) published articles by Berenson almost immediately, with three stories run on the front page between December 17 and December 21.<sup>92</sup> The articles relied heavily on the documents obtained from Egilman via Gottstein.

Contemporaneously, the documents were widely distributed online. One of the recipients, Mind Freedom International, posted a statement on December 29, 2006, noting the dispute that had taken place in the meantime and also linking to a site providing information about the “Tor” software<sup>93</sup> and how it could be used to obtain the documents.<sup>94</sup>

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89. Transcript of Hearing Before Hon. Jack Weinstein, *supra* note 81, at 199–200.

90. *Zyprexa Injunction*, 474 F. Supp. 2d at 401, 402–03.

91. *Id.* at 402.

92. *Id.* at 405; see also Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. TIMES, Dec. 17, 2006, at A1; Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use*, N.Y. TIMES, Dec. 18, 2006, at A1; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. TIMES, Dec. 21, 2006, at C1.

93. See discussion *infra* Part II.D.

94. Posting of mindfreedom-news@internex.net to news:misc.activism.progressive (Dec. 31, 2006, 02:32:53 CST), news:en7sjl\$5ed\$1@pencil.math.missouri.edu, available at <http://groups.google.com/groups?selm=en7sjl%245ed%241%40pencil.math.missouri.edu>. The posting contained the following “disclaimer” at its end: “In the public interest, MindFreedom is forwarding the anonymous alerts referred to on this page and in MFI emails. MFI did not originate these alerts, MFI does not vouch for their authenticity or accuracy, that’s all the information we have, MFI is not providing advice about the legality of

Evidently following up on its December 13 contact with the Lanier firm, on December 14—two days after Egilman had already started producing documents, but still six days prior to the original subpoena's return date—Lilly wrote to Egilman and Gottstein, directing both to refrain from producing documents unless directed by the relevant state court in Alaska.<sup>95</sup> Egilman responded the same day, this time noting that he had already started producing the documents and arguing that he had complied with the Protective Order.<sup>96</sup> As Judge Weinstein drily noted, “[H]e did not address the question of why he never notified Lilly about the second subpoena with its revised production date.”<sup>97</sup> Upon learning that the documents had already been produced, Lilly wrote to Gottstein the following day, asking that he return the documents, cease further distribution, request the return of them from those to whom he had sent them, and identify the recipients.<sup>98</sup>

### C. *The Documents Are Virally Distributed*

By then, however, the documents were already beyond the control of any one person or group of people. Gottstein had sent them to enough people—and enough of those people had sent the documents (electronically) to enough other people—that, due to some recipients' relative technological savvy and sheer volume, the documents simply were impossible to recover.

Some of the recipients immediately made efforts to distribute the documents as widely as possible. Robert Whitaker, for instance, made it quite clear that he anticipated potential challenges to the documents' availability:

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downloading the 'ZyprexaKills' files, MFI is not encouraging anyone to conduct illegal activities regarding these files, and MFI itself is not providing the 'ZyprexaKills' files for download.” *Id.*

95. *Zyprexa Injunction*, 474 F. Supp. 2d at 402.

96. Not long after receipt of this letter, the Lanier firm directed him to return all Zyprexa documents and terminated him from the Zyprexa litigation. *Id.* at 403. I have been told, but cannot confirm, that he has been fired from other work for the Lanier firm.

97. *Id.*

98. *Id.* at 403. The other efforts to retrieve the documents are discussed *infra* Part II.E.



I would consider building a website that would, ahem, make all the documents available. What could they do to me? And how could they know how the documents got to me? There are several channels apparently that could be the source. You should proceed now in whatever way makes it easiest for you, and let others worry about getting this information out or making it public.<sup>99</sup>

Over the following couple of weeks, several groups associated with some recipients distributed the documents widely.<sup>100</sup> One organization called MindFreedom (whose board member Judi Chamberlain was a recipient of the documents) made extensive e-mail and web communications informing supporters of where the documents could be downloaded. The group's executive director sent an e-mail to the organization's listserv of several thousand people on Christmas day, linking to a website with the documents and noting that the anonymous people distributing the documents (the distribution he was linking to) were "counting on the fact that many courts are closed today."<sup>101</sup> On December 30, a press release noted the injunction but also directed readers to sites "not sponsored by MindFreedom" where the documents could be downloaded, including both Tor sites and a free document transfer site, file-upload.com.<sup>102</sup>

Another recipient (and recipient of the TRO), Vera Sharav, posted the injunction on the website of the organization "Alliance for Human Research Protection," along with the following notation: "See the court injunction several of us received . . . but the internet is an uncontrolled information highway. You never know where and when the court's suppressed documents might surface."<sup>103</sup> The

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99. *Zyprexa Injunction*, 474 F. Supp. 2d at 407.

100. *Id.*

101. *Id.*

102. Info on "ZyprexaKills" Campaign—Portal (Dec. 30, 2006), <http://www.mindfreedom.org/know/psych-drug-corp/eli-lilly-secrets/zyprexakills>, reprinted in Proposed Findings of Fact by Eli Lilly & Co. app. at 195–96, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (E.D.N.Y. Jan. 5, 2007), available at <http://psychrights.org/states/alaska/casexx/EilLilly/Exxhibits2LillyProposedFindin> gsofFact.pdf. These transfer technologies are described *infra*.

103. *Zyprexa Injunction*, 474 F. Supp. 2d at 407–08.

posting concluded with links to two websites that, at the time, evidently had the documents available for download.<sup>104</sup>

In other words, whether or not the recipients were explicitly told at any point that the documents they received were likely to be the subject of further litigation, they knew that widespread and rapid distribution was, for their purposes, desirable.<sup>105</sup> And they used the available technologies—technologies that have come into existence in the past five to ten years—to achieve those goals.

By December 23, 2006, ten days after Egilman started to transfer the documents to Gottstein, the documents had been distributed via “Tor.”<sup>106</sup> They also promptly became available via the file sharing system known as BitTorrent.<sup>107</sup> As of this writing, a Google search for the term “zyprexakills.tar.gz” (the most common name for the file archive) results in 435 results.<sup>108</sup> Most likely some number of those results point to common sources, but the results nonetheless indicate the breadth of the documents’ distribution.

The ease and speed with which the documents were distributed—and with which any future leaked documents will be distributed—is critical for understanding why it is that the old model of enforcement post-violation is no longer an option. Thus, a summary of the various technologies used is appropriate.

The first means of distribution—and the most important for purposes of this Article, as it was the distribution that simply could not be stopped—was via “Tor,” a network developed to facilitate anonymous Internet usage.<sup>109</sup> Created with the support of the Electronic Frontier Foundation, among others, the network’s developers describe it as “a network of virtual tunnels that allows

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104. *Id.*

105. Of course, virtually every document in the archive has imprinted on every page “Confidential and Subject to Protective Order,” making it not particularly difficult to guess that the documents were at least potentially obtained under questionable circumstances.

106. See Posting of Rafi to FreeCulture @ NYU, <http://www.freeculturenyu.org/2006/12/23/zyprexa-kills-campaign/#comment-2512> (Dec. 23, 2006, 4:02 PM EST) (providing a link to [http://digg.com/security/Zyprexa\\_Memos\\_Leaked\\_using\\_Tor](http://digg.com/security/Zyprexa_Memos_Leaked_using_Tor)).

107. See Posting of bigwyrn to [http://digg.com/security/Zyprexa\\_Memos\\_Leaked\\_using\\_Tor?t=4649295#c4649295](http://digg.com/security/Zyprexa_Memos_Leaked_using_Tor?t=4649295#c4649295) (Jan. 9, 2007) (claiming that the files were available on BitTorrent and providing a link to <http://thepiratebay.org/tor/3589817/ZyprexaKills.tar.gz>).

108. Google Search, <http://www.google.com/search?q=zyprexakills.tar.gz>.

109. Tor: Overview (Feb. 27, 2008), <http://tor.eff.org/overview.html.en>.

people and groups to improve their privacy and security on the Internet.”<sup>110</sup> Most importantly for the distribution of documents such as these, “Tor’s hidden services let users publish web sites and other services without needing to reveal the location of the site.”<sup>111</sup> By using those services, a URL is created with the top-level domain “.onion,” rather than the common “.com,” “.net,” “.org,” or any other top-level domain.<sup>112</sup> Thus, in this case, one of the ultimate recipients of the Zyprexa documents set up a website that was reachable at <http://tdkhrvozivoez5ad.onion/>.<sup>113</sup> The advantage to the creator of using a “hidden site” is just that—it is hidden. Unless the operator errs in setting it up, the location (physical, network, or other) is not able to be determined.

The details are not terribly important, but in essence, the Tor network passes data along through a number of cooperating servers, each of which only knows a little bit about the origin and destination of the data.<sup>114</sup> Put another way, each server only knows where the data packet came from and where the data packet is going, but neither the ultimate origin nor the ultimate destination.<sup>115</sup> Further, each step is separately encrypted, and the path taken changes every minute or so.<sup>116</sup>

Using the same basic approach, the Tor network can provide “hidden” websites.<sup>117</sup> Unless the site’s location is disclosed in some other way, the reader cannot determine the site’s origin, and the proprietor of the site cannot identify anyone who posts onto the site.<sup>118</sup> Thus, it is impossible for a party or the court to identify the proprietor of the Tor site used to host the Zyprexa documents.<sup>119</sup>

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110. *Id.*; cf. Alex Curtis, *Senator Ted Stevens Speaks on Network Neutrality*, PUBLIC KNOWLEDGE, June 28, 2006, <http://www.publicknowledge.org/node/497>.

111. Tor: Overview, *supra* note 109.

112. See Tor: Hidden Service Configuration Instructions (Feb. 27, 2008), <http://tor.eff.org/docs/tor-hidden-service.html.en> (describing the “hidden services”).

113. See Posting of fgrieczfbz to FreeCulture @ NYU, <http://www.freeculturenyu.org/2006/12/23/zyprexa-kills-campaign/#comment-3353> (Jan. 1, 2007, 10:12 PM EST) (linking to <http://tdkhrvozivoez5ad.onion/>).

114. Tor: Overview, *supra* note 109.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

Similarly, BitTorrent provides an alternate means of distribution that is extremely difficult to trace and shut down. BitTorrent “is a file-sharing program that allows users to download a file from many other users, rather than from a central server like Napster.”<sup>120</sup> Many—perhaps most—of the 435 results noted above<sup>121</sup> are references to BitTorrent indices providing access to the document archive. The structure of BitTorrent makes it difficult to stop data distribution *not* because it is particularly difficult to find out who is using it, but because of the distributed nature of the files being delivered.<sup>122</sup> The files are divided up amongst the many computers that are part of the network and that have the relevant file, so that someone downloading the Zyprexa documents, for example, might be downloading the archive from a dozen different computers around the world.<sup>123</sup> Each new downloader represents another potential seed for the archive. Thus, even if someone attempting to enforce an injunction or protective order could find eleven of the twelve, that twelfth could quickly multiply again, with the endeavor turning into a high-tech game of Whac-A-Mole.<sup>124</sup>

Finally, a number of anonymous file transfer sites have come into existence since roughly 2003. With names like YouSendIt.com, RapidShare.de, SendThisFile.com, and the like, these sites are advertised as ways to avoid problems with limitations on e-mail attachment sizes.<sup>125</sup> In addition to those uses, these sites are

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120. Dan Leroy, *If It's Live, It's Probably Already Online*, N.Y. TIMES, Sept. 12, 2004, at CN14.

121. Google Search, *supra* note 108.

122. Paul Boutin, *Caveat MPAA: Meet Bittorrent, the File-Sharing Network That Makes Trading Movies a Breeze*, SLATE, Feb. 27, 2004, <http://www.slate.com/id/2096316/>. Indeed, the creator of BitTorrent has “refused to add privacy protections that could keep users from being traced by, say, Hollywood lawyers.” *Id.* That said, various services purport to block one’s identity while using peer-to-peer software such as BitTorrent. Paul Gil, *Anonymous Surfing: How to Conceal Your Digital Identity While Online* (Apr. 17, 2007), [http://netforbeginners.about.com/od/internet101/f/anonymous\\_surf.htm](http://netforbeginners.about.com/od/internet101/f/anonymous_surf.htm). In fact, Tor could theoretically be used in conjunction with BitTorrent, but the download speeds are reportedly slowed dramatically, since it is not designed for such use. See generally Digg - Bittorrent Masking: How to Avoid Getting Tracked as you Download, [http://www.digg.com/software/Bittorrent\\_Masking:\\_How\\_to\\_Avoid\\_Getting\\_Tracked\\_as\\_You\\_Download](http://www.digg.com/software/Bittorrent_Masking:_How_to_Avoid_Getting_Tracked_as_You_Download).

123. Boutin, *supra* note 122.

124. WHACAMOLE.COM, <http://whacamole.com/>.

125. For instance, Comcast prohibits attachments greater than 10 MB on its outgoing mail server. Help - Faq - Comcast.net, <http://www.comcast.net/help/faq/>

frequently used for (legal or illegal) distribution of music and video files, and, in this case, for the rapid and relatively anonymous distribution of large numbers of documents.<sup>126</sup> Though many of these sites nominally require registration for some services, others do not, and those that do can often be evaded through the use of a “disposable e-mail address” provided by various services like Mailinator.com.

Since the leak described herein, a new website—WikiLeaks.org—has been formed with the stated purpose of “developing an uncensorable system for untraceable mass document leaking and public analysis.”<sup>127</sup> More specifically, the planned site “combines the protection and anonymity of cutting-edge cryptographic technologies with the transparency and simplicity of a wiki interface.”<sup>128</sup> What precisely it will include is unclear, and it appears to focus primarily on government documents from outside of the United States, but it is, at the least, indicative that the use of the Internet for widespread distribution is growing and will continue to do so.

Together, these technologies make the widespread distribution of tens of thousands of pages a trivial matter, with virtually no financial cost besides Internet access. Put another way, today’s Internet makes any leak an immediate and irreversible deluge. And that is precisely what happened in this case, as described above and below.<sup>129</sup>

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index.jsp?faq=Email117627. These services still have size limitations, but files are fairly easily split up into smaller sections. See, e.g., Frequently Asked Questions | YouSendIt, <http://www.yousendit.com/cms/faq> (limiting transfers to 2 GB for paid accounts and 100 MB for “lite” accounts); RapidShare Webhosting + Webspace, <http://rapidshare.de/> (allowing up to 300 MB per file).

126. As of this writing, there appear to be few if any instances of the documents on those file services. The uploads (especially with free accounts) typically expire within a week or so. When, on January 8, 2007, I wrote that “[o]nce I thought of the better approach (which on better days I would have tried first)” it took less than thirty seconds to find the documents, I was referring to performing a Google search for [zyprexakills.tar.gz](http://zyprexakills.tar.gz). Childs, *supra* note 60. At that time, my recollection is that there were at least five easily-found links to the document archive on sites like YouSendIt.com.

127. Wikileaks, <http://wikileaks.org/wiki/Wikileaks>.

128. Wikileaks:About, <http://wikileaks.org/wiki/Wikileaks:About>.

129. The details are not critical, but, as noted above, the documents have persistently been available—easily—through one or more of the technologies described above.

*D. The Retrieval Efforts*

Throughout the time period of late December of 2006 and January of 2007, the litigants (including the plaintiffs' attorneys in the tort litigation) and the court were making significant efforts to retrieve the documents<sup>130</sup>—efforts which were, as described above, largely futile.

On December 15 (three days after Egilman had started sending documents to Gottstein, and two days after Gottstein started distributing documents to over a dozen people), the discovery special master, Peter Woodin, learned of the documents' delivery to Gottstein.<sup>131</sup> He issued an order requested jointly by the plaintiffs and defendant; that order directed Gottstein and Egilman to deliver all Zyprexa documents (including copies delivered to others) to Woodin's office.<sup>132</sup> Gottstein responded by e-mail, challenging the special master's authority, the court's jurisdiction, and the ex parte nature of the order, but also stating that he had ceased distribution of the documents.<sup>133</sup> He did not report any effort to comply with the rest of the order—i.e., attempting to retrieve the documents from others to whom he had delivered them.<sup>134</sup>

Three days later, Lilly and the Plaintiffs' Steering Committee jointly requested an injunction requiring the documents' return. The initial request was to the magistrate judge, who was clearly unhappy, describing the events as “disturbing” and as having the “ring of collusion.”<sup>135</sup> He continued:

I think that what happened here was an intentional violation of Judge Weinstein's orders. . . . I personally am not in a position to order you [Gottstein]

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130. See discussion *infra*.

131. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 404–05 (E.D.N.Y. 2007).

132. *Id.*

133. E-mail from James Gottstein to Special Master Peter H. Woodin (Dec. 17, 2006), available at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/e-mail2Woodin12-16-06.pdf>.

134. *Id.*

135. Transcript of Telephone Conference Before Hon. Robert Mann at 9, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (JBW) (E.D.N.Y. Dec. 18, 2006), available at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/12-18-06HearingNo1Transcript.pdf>.

to return the document. I can't make you return them, but I can make you wish you had because I think this is highly improper not only to have obtained the documents on short notice without Lilly being advised of the amendment but then to disseminate them publicly before it could be litigated. It certainly smacks [of] bad faith.<sup>136</sup>

The same day, the parties jointly approached the emergency judge, Judge Cogan.<sup>137</sup> After hearing from Lilly, the Plaintiffs' Steering Committee, and, through counsel, Gottstein, Judge Cogan issued a temporary restraining order, finding that Gottstein "deliberately and knowingly aided and abetted Dr. David Egilman's breach of" the protective order.<sup>138</sup> Gottstein was enjoined from any further distribution and ordered to return all documents (including copies) and to identify all of the people to whom he distributed the documents.<sup>139</sup> Gottstein subsequently contacted all of the people to whom he had transmitted the documents; many of them returned the documents, while others did not.<sup>140</sup> He certified compliance with the order by letter on December 21.<sup>141</sup> But of course, he was not required to actually retrieve documents from others, but only to request their return.

On December 29, the parties to the MDL jointly requested a preliminary injunction reaching those people who had not complied with Gottstein's request to return the documents.<sup>142</sup> That injunction was issued the same day by Judge Cogan, barring twelve individuals from disseminating the documents, requiring the documents' removal from any website to which they had posted them, and requiring that those individuals inform any further recipients of the terms of the preliminary injunction.<sup>143</sup> At a January 3, 2007 hearing before Judge Weinstein, the parties who were present agreed to the

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136. *Id.* at 10; *Zyprexa Injunction*, 474 F. Supp. 2d at 405.

137. *Zyprexa Injunction*, 474 F. Supp. 2d at 405–06, 428.

138. *Id.* at 405–06 (quoting *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2006 WL 3877528, at \*1 (E.D.N.Y. Dec. 19, 2006) (order granting mandatory injunction)).

139. The TRO also required that he preserve all relevant communications.

140. *Zyprexa Injunction*, 474 F. Supp. 2d at 406.

141. *Id.*

142. *Id.* at 407–08.

143. *Id.* at 407.

preliminary injunction's extension to January 16, when an evidentiary hearing was scheduled.<sup>144</sup> A day later, Judge Weinstein agreed to expand the enjoined parties to include two additional groups, five websites, and an individual, all of whom were distributing the documents.<sup>145</sup> And a two-day evidentiary hearing began on January 16, 2007, with representation present for most of the enjoined parties and websites, in addition to representation by the Electronic Freedom Foundation for an anonymous person who wished to post the documents online.<sup>146</sup> On the 16th, Judge Weinstein also extended the preliminary injunction until such time as he considered a permanent injunction.<sup>147</sup> Four witnesses testified: Gottstein himself, Richard Meadow (an attorney with the Lanier firm), Vera Sharav, and David Oaks.<sup>148</sup>

Judge Weinstein issued that injunction on February 13, 2007.<sup>149</sup> The injunction was, as noted above, almost entirely ineffectual in actually limiting access to the documents.<sup>150</sup> Today (a year later as of this writing), the documents are readily available, still emblazoned with "Eli Lilly—Zyprexa Products Liability Litigation" and "Confidential and Subject to Protective Order" at the bottom of every page. Also as of this writing, no contempt motions have been brought against any of the people involved, though filings suggest that a settlement of issues relating to the document distribution may be forthcoming.<sup>151</sup>

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144. *Id.* at 408.

145. *Id.*

146. Transcript of Hearing Before Hon. Jack Weinstein, *supra* note 81, at 1–3. Alex Berenson of the *New York Times* was not represented; he was also not subject to the injunction. On January 29, Judge Weinstein issued an "invitation" to Berenson "to confront testimony received [at the hearing] implicating him in a conspiracy to obtain and publish confidential documents sealed by this court." *Zyprexa Injunction*, 474 F. Supp. 2d at 408. Through counsel, Berenson declined. *Id.* at 411.

147. *Zyprexa Injunction*, 474 F. Supp. 2d at 408.

148. As noted above, Sharav and Oaks are both associated with recipients of the documents.

149. *Zyprexa Injunction*, 474 F. Supp. 2d 385.

150. Zeller, *supra* note 2.

151. Motion for Extension of Deadlines, *In re Zyprexa Prods. Liab. Litig.*, Nos. 07-1107-cv, 07-1030-cv (2d Cir. May 29, 2007), available at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/InjunctionAppeal/90-dayExtensionMotion.pdf>.



In early September 2007, Lilly and Egilman settled any potential contempt charges. Egilman agreed to pay \$100,000 (to be donated to a mental health charity selected by Lilly), acknowledged violation of the protective order,<sup>152</sup> acknowledged that Lilly had a story that he did not seek to tell through his document release, and acknowledged that his targeted leak helped plaintiffs.<sup>153</sup> He additionally expressed “regret” for his actions.<sup>154</sup>

Potential contempt charges against Gottstein and others apparently remain possible. As of October 2007, Gottstein reported that he was hopeful that settlement talks would be successful, and his appeal has been suspended during their pendency.<sup>155</sup>

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152. *In re Zyprexa Prods. Liab. Litig.*, No. 07-CV-00504, slip op. at 1–2 (E.D.N.Y. Sept. 7, 2007) (stipulated order).

153. See Declaration of David Egilman, *In re Zyprexa Prods. Liab. Litig.*, No. 1:07-CV-00504-JBW-RLM (E.D.N.Y. Sept. 7, 2007), available at <http://lawprofessors.typepad.com/tortspof/files/EgilmanAffidavit.pdf>. A bit oddly, Egilman and his counsel argued that Egilman did not acknowledge doing anything illegal, evidently concluding that “illegal” would only include clearly criminal conduct. Ed Silverman, *Lilly Settles with Zyprexa Document Leaker*, PHARMALOT, Sept. 7, 2007, available at <http://www.pharmalot.com/2007/09/lilly-settles-with-zyprexa-document-leaker/>; Avery Johnson, *Lilly and Leaker Settle, but Arguments Drag On*, WALL ST. J. HEALTH BLOG, Sept. 7, 2007, <http://blogs.wsj.com/health/2007/09/07/lilly-and-leaker-settle-but-arguments-drag-on/>. While parsing the affidavit is not central to this Article, I think that the admission of a violation of a federal judge’s order, see Declaration of David Egilman, *supra* (“I violated Case Management Order No. 3 (‘CMO-3’), which is in force in the Zyprexa MDL.”), can reasonably be called the admission of illegal activity.

Additionally, though Egilman’s affidavit explicitly states that he “released documents that did not represent the entire set of information concerning Lilly’s action and knowledge,” he disputed any characterization of what he did as “cherry-picking.” He stated that he released all of the documents that he had (though he does not state whether he previously had other documents or could have accessed more), and thus says that he was not cherry-picking. Declaration of David Egilman, *supra*. Whether only obtaining “bad documents” constitutes misconduct on the part of a scientist or an expert witness is beyond the scope of this Article, but it’s an interesting question.

154. Declaration of David Egilman, *supra* note 153.

155. Mr. Gottstein told me this in an October 2007 interview on a radio show I do, *Swimming with Sharks*, on WXOJ-LP in Northampton, Massachusetts. Unfortunately, the recording of the show did not work.

E. *The Documents' Contents*

The full range of the leaked documents is not particularly important for present purposes, but several observations are relevant. First, as alluded to earlier, the importance of many of the documents is readily overstated. As just one example, a number of the documents contain summaries of analyses of spontaneous adverse event reports. Such reports come from voluntary reporting by health care providers and others and, according to most epidemiologists and regulatory agencies, can be used only for signal generation.<sup>156</sup> While it is entirely appropriate to perform and consider such analyses, the coverage (both in traditional news outlets and online sources) confirms that the analyses are easily over-read.<sup>157</sup> That is not to say that the information in them is irrelevant to the product's safety—only that many of them lack context to provide a full understanding.<sup>158</sup>

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156. Statement of Janet Woodcock before Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 17, 2006), *available at* <http://www.fda.gov/ola/2006/mifepristone0517.html>.

157. The analyses also contain a number of clearly confidential items, including sales figures, comparative sales figures (which are typically obtained from third-party vendors under non-disclosure agreements), and the like, which helps to explain why they can properly be designated as confidential.

As noted *infra* note 180, research suggests that people generally have difficulty accurately discerning the tone of e-mails, due presumably to the offhand way in which they are authored. Though it seems less so in the Zyprexa litigation, my experience suggests that many of the “bad documents” used by plaintiffs in products litigation are created in a similar fashion—casual e-mails among colleagues, often using shorthand that, read years later, creates a different impression than intended. Certainly such e-mails have some evidentiary force regardless, but those documents demand context even more than usual, I suggest.

158. While it is difficult to quantify—and most efforts to do so have been done by people with a financial interest in the outcome—there is also the danger that publicity about potential (but uncertain) dangers of a medicine will cause patients to take themselves off of the medicine. *New Survey Shows Product Liability Litigation May Jeopardize Treatment Options for People with Severe Mental Illnesses*, MEDICAL NEWS TODAY, June 14, 2007, <http://www.medicalnewstoday.com/articles/74116.php>; see Press Release, National Council for Community Behavioral Healthcare, Barriers to Treatment Survey Findings, [http://nccbh.browsermedia.com/cs/barriers\\_to\\_treatment\\_survey\\_findings](http://nccbh.browsermedia.com/cs/barriers_to_treatment_survey_findings) (indicating that plaintiffs' lawyers' advertising can reduce compliance with prescriptions).

Second, the documents include some designated as “confidential” that are not, at least on their face, confidential.<sup>159</sup> For instance, a 1996 warning letter from the FDA’s marketing regulatory arm is designated as confidential,<sup>160</sup> though these documents are (at least now) routinely placed on the FDA’s website.<sup>161</sup> A brief review of the documents indicates that few fit into this category, but then again, that is consistent with what Dr. Egilman’s evident intent was. Given the massive volume of documents produced, some improper designations are no doubt inevitable, but some designations (at least in some cases) are likely made due more to a fear of exposure than a firm belief in the documents’ confidentiality.

#### *F. Other Examples of Protective Order Violations*

The Zyprexa document leak is perhaps the best example of the modern implications of a document leak under a protective order. But it is far from the only example.

While not an example from a mass tort, a high-profile document leak in Mississippi and Alabama has led to civil and criminal charges against prominent plaintiffs’ lawyer Dickie Scruggs in litigation relating to Hurricane Katrina and insurance coverage.<sup>162</sup> In brief, two sisters worked for a company that provided services to State Farm, helping provide claims adjustment services in the aftermath of Hurricane Katrina.<sup>163</sup> The sisters believed that they witnessed fraud on the part of State Farm and began to photocopy

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159. This might be in part due to the fact that the protective order allows parties to unilaterally designate documents as confidential, only requiring a good faith belief in the propriety of the decision. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 398 (E.D.N.Y. 2007).

160. Letter from Kenneth R. Feather, Food & Drug Admin., to Charles R. Perry, Jr., Eli Lilly & Co. (Nov. 14, 1996) (on file with author).

161. Warning Letters and Notice of Violation Letters to Pharmaceutical Companies (Mar. 4, 2008), <http://www.fda.gov/cder/warn/>. The FDA web page only goes back to 1997, and some letters on the page are redacted to remove confidential information. The Zyprexa warning letter may well contain some confidential information, but redaction likely could have readily resolved the issue.

162. See *E.A. Renfroe & Co. v. Moran*, No. 3:07-MC-036-SAA, 2007 WL 4276906, at \*1 (N.D. Miss. Dec. 3, 2007) (discussing procedural history where plaintiff moved that court find Scruggs in contempt for violating preliminary injunction on discovery documents).

163. *E.A. Renfroe & Co. v. Moran*, 508 F. Supp. 2d 986, 988 (N.D. Ala. 2007).

documents that they believed to constitute evidence of improper conduct by State Farm.<sup>164</sup> They then (in early 2006) hired Scruggs to represent them as whistleblowers and then to defend them against lawsuits by State Farm alleging breach of their employment agreement.<sup>165</sup> Not long afterwards, they became paid “consultants” to Scruggs’s team of Mississippi lawyers involved in insurance coverage litigation relating to Katrina.<sup>166</sup> In December 2006, U.S. District Judge William Acker ordered that the putative whistleblowing sisters and their attorneys return the documents to State Farm, but Scruggs sent a set to Mississippi Attorney General Jim Hood.<sup>167</sup> Judge Acker concluded that “Scruggs willfully violated the court’s December 8, 2006 preliminary injunction, and that referral to a prosecutor is the appropriate course to take to vindicate the court’s authority.”<sup>168</sup> The Department of Justice declined to prosecute Scruggs.<sup>169</sup> Judge Acker then appointed two private attorneys as special prosecutors,<sup>170</sup> and, as of this writing, the case is in pre-trial proceedings.<sup>171</sup> The leaked documents (and the sisters’ allegations relating to their experiences working for the adjuster) have been used both to attempt to recruit new clients and as a way to push for settlement.<sup>172</sup>

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164. *Id.*

165. *Id.*

166. *Id.* at 988–89.

167. *Id.* at 989–91.

168. *Id.* at 995.

169. *E.A. Renfroe & Co. v. Moran*, Civil Action No. 06-AR-1752-S, 2007 WL 2212678, at \*1 (N.D. Ala. July 26, 2007) (order appointing special prosecutors).

170. *Id.*

171. Peter Lattman, *The Latest in the Contempt Case Against Dickie Scruggs*, WALL ST. J. LAW BLOG, Oct. 17, 2007, <http://blogs.wsj.com/law/2007/10/17/the-latest-in-the-contempt-case-against-dickie-scruggs/>; *United States v. Scruggs*, No. CR-07-CO-03-25-s (N.D. Ala. Aug. 21, 2007) (allegations of criminal contempt of court).

172. In a television advertisement for the Scruggs Katrina Group, one of the sisters, Kerri Rigsby, discusses why viewers should not accept any offers from insurance companies: “It’s rigged against you. How do I know? I’m Kerri Rigsby and I used to work for State Farm. I know firsthand how far they will go to avoid paying your claim. Take it from me, you need a lawyer not the Insurance Commissioner’s mediation program.” YouTube - Lawyer’s TV Ad Takes On Big Insurance (May 25, 2007), <http://youtube.com/watch?v=7YSnfAfn6DA>.

During the pendency of the potential contempt charges, one member of the Scruggs Katrina Group offered to return some portion of the stolen documents “as

Other examples are largely not as well documented as either the Zyprexa or the Scruggs cases. By way of example, there were at least allegations of improper distribution of confidential or privileged documents in tobacco litigation,<sup>173</sup> tire litigation,<sup>174</sup> the litigation relating to the statin Baycol (as described above),<sup>175</sup> and litigation relating to bone screws.<sup>176</sup> Strikingly, David Egilman himself was found to have violated a prior gag order in beryllium litigation.<sup>177</sup>

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part of a settlement offer.” E.A. Renfroe & Co. v. Moran, Civil Action No. 06-AR-1752-S, slip op. at 9 (N.D. Ala. July 15, 2007) (order refusing to impose civil contempt charges).

173. See Defendant Brown & Williamson Tobacco Corporation’s Motion in Limine to Exclude Its Privileged and Protected Stolen Documents, Newcomb v. R.J. Reynolds Tobacco Co., No. 88913-8 T.D. (Tenn. Cir. Court, Shelby County Jan. 12, 1999). The litigation over the documents in that litigation is complex, to say the least. Plaintiffs contended that the defendants waived privilege as to some, and that others lost their privileged status under the crime fraud exception. Such a discussion is far beyond the scope of this Article; I note it simply as an example. Notably, Dickie Scruggs of the criminal contempt charges was also involved in the tobacco document, purchasing the paralegal who leaked the documents a home and a boat. Interviews: Richard Scruggs, Frontline: Inside the Tobacco Deal, <http://www.pbs.org/wgbh/pages/frontline/shows/settlement/interviews/scruggs.html>.

174. Nevil v. Ford Motor Co., No. CV 294-051, 1999 WL 1338625 (S.D. Ga. Dec. 23, 1999) (order sanctioning plaintiff’s expert for disclosing confidential information in unrelated litigation). The defendants in that case did not seek significant sanctions, and the court did not impose significant sanctions, instead essentially reiterating the terms of the extant protective order. *Id.* In another tire case, a plaintiff’s attorney was sanctioned for disclosing deposition testimony subject to a protective order to another attorney in different litigation against the same defendant. McDonald v. Cooper Tire & Rubber Co., No. 801CV1306T27TGW, 2005 WL 3372855 (M.D. Fla. Dec. 12, 2005) (awarding the defendant attorney’s fees for enforcing the protective order), *affirmed*, 186 F. App’x 930 (11th Cir. 2006).

175. See discussion *supra* note 19. As noted there, I was involved in the defense of the Baycol litigation and remain a consultant to the company.

176. See Holman W. Jenkins, Jr., *Orthopedics for the FDA’s Forked Tongue*, WALL ST. J., Aug. 26, 1997, at A17.

177. Pamela A. MacLean, *Law Firms Not Liable in Alleged Web Hacking Case*, NAT’L L. J., Dec. 9, 2005, <http://www.law.com/jsp/article.jsp?id=1134036310706>. In that case, the court ordered that participants not make extrajudicial statements; Egilman was found to have violated that order by posting statements on his password-protected website. The defendants obtained access to his statements by using a user name and password provided by a third-party. The trial court sanctioned Egilman; on appeal, he won reversal of the part of the sanctions that prohibited him from testifying in that courtroom in the future. Egilman v. Dist. Court (*Plaut*), No. 01CA1982, slip op. at 5 (Colo. Ct. App. Sept. 5, 2002), *available at* <http://egilman.com/Documents/JonesDay%20illegal>

## III. WHAT—IF ANYTHING—SHOULD CHANGE?

Most serious and fundamental consideration of protective orders in mass litigation took place a decade or more ago.<sup>178</sup> Even scholarship that is more recent builds largely on that earlier scholarship, without serious consideration of changes in circumstances that may counsel in favor of policy changes. The Zyprexa case described above provides stark examples of those changes, all of which relate in one way or another to technological changes.

First, the sheer volume of documents has exploded. Communications that even ten or fifteen years ago might have been by phone or in person are frequently now made via e-mail, and those e-mails may end up being retained for years. While precise numbers are difficult to find, experienced mass tort lawyers confirm that the quantity of documents produced is larger by orders of magnitude than it was in even the early 1990s.<sup>179</sup> Litigation that might have at one point produced, say, a million pages of documents now routinely results in tens of millions of pages. With that increase comes a concomitant increase in expenses in review and production, and the accompanying increased odds of errors in that process. Put briefly, non-confidential documents are more likely to be incorrectly designated, whether innocently or not.

Second, in the world of immediate digital distribution, once a confidential document has been leaked to even one minimally technologically savvy person, it is almost certain to be permanently available. Even if the source of documents could be identified, often they are beyond the jurisdictional reach of interested courts and, in the unlikely event that they are retrieved, the documents are likely to pop up again elsewhere, without the context that a trial provides (and that judges cite in creating protective orders).

The harm caused by a lack of contextualization is exacerbated by the nature of the documents in question. Research

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%20activities/appeals\_court\_decision.pdf. It appears that one of the defense lawyers involved was disciplined for his part in obtaining access to the documents. Letter from William R. Garrett, Assistant Disciplinary Counsel, State Bar of Texas, to David Egilman, care of Robert Greenberg (Oct. 2 2003), *available at* [http://egilman.com/Documents/JonesDay%20illegal%20activities/stewart\\_bar.pdf](http://egilman.com/Documents/JonesDay%20illegal%20activities/stewart_bar.pdf).

178. *See supra* Part I.

179. One need only look at the multitude of electronic discovery services available today to at least infer that the electronic nature of communications has fundamentally changed document production quantities.

confirms what most users of electronic communications already know: people are not as thoughtful when writing electronic communications as they are in other contexts.<sup>180</sup> Thus, in addition to the inherent harm in the distribution of confidential documents and the extant risk of documents being distributed and reviewed in isolation, the danger of inaccurate impressions being created is increased when the documents in question are of this sort. Further, the probability of inaccurate impressions being given by such documents may increase the risk of non-innocent mis-designation of documents.

Another potential danger of document leaks and the lack of context is the unwarranted creation of fear among patients on any particular medicine or users of any particular product in question. Industry-funded studies have suggested that advertisements for attorneys seeking clients on particular drugs may cause patients to take themselves off the medicines.<sup>181</sup> One can at least hypothesize that a similar cause-and-effect could take place from stories suggesting problems with a drug.

Finally, any approach has to take into consideration public confidence and public interest in access to relevant information. If interested third-parties believe that material non-confidential information impacting public health will remain unavailable, the probability increases that they will attempt to distribute documents in violation of protective orders.

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180. See Justin Kruger et al., *Egocentrism Over E-mail: Can We Communicate as Well as We Think?*, 89 J. PERSONALITY & SOC. PSYCHOL. 925 (2005); see also *supra* note 18 (discussing the problems with isolated documents). Of course, a lack of context for documents is not new; the most notorious “smoking gun” document, that of the Ford Pinto, was most thoroughly discussed by Gary Schwartz. Gary Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991). I discuss the Pinto document every year in my Torts class, and students, many years after its first coming onto the national consciousness, still consistently know of it—and don’t know the reality of it. More recently, a low-level employee of Wyeth wrote an offensive e-mail complaining about having to deal with the settlements of claims for what she termed “fat people” scared of a “silly” problem, and, by most accounts, that e-mail was at least important to plaintiffs’ very successful pursuit of the diet drug litigation. Robert D. Brownstone, *Preserve or Perish; Destroy or Drown—eDiscovery Morphs into Electronic Information Management*, 8 N.C. J.L. & TECH. 1, 5 (2006). My former law firm was involved in the diet drug litigation; I was not.

181. William Childs, *Ads & Patient Care*, TORTSPROF BLOG, June 14, 2007, [http://lawprofessors.typepad.com/tortspref/2007/06/ads\\_patient\\_car.html](http://lawprofessors.typepad.com/tortspref/2007/06/ads_patient_car.html).

Ultimately, the umbrella protective order in concept remains sound and has the flexibility to address all of these concerns. The fundamental reasons supporting such orders still exist. Indeed, if anything, such orders are even more necessary, given the utter impracticability of judges individually reviewing the hundreds of thousands or millions of pages in question. The question, then, is what to do with these concerns—the implications of the growth in document numbers and of immediate distribution.

First, Judge Weinstein's desire for consistency<sup>182</sup> is still a good idea. While protective orders today certainly have many similarities, there would be value in more consistency, if for no other reason than to permit interested parties to identify their scope readily.

Second, protective orders should have specific and transparent mechanisms for third-party involvement in confidentiality challenges. As described above, the parties to litigation frequently have incentives to cooperate in maintaining documents as secret even without justification—the plaintiffs' counsel to increase leverage, the defendants' counsel to avoid distribution of harmful (but non-secret) documents. Third-party involvement can serve as a useful check on these interests, and, at least in mass tort litigation where these umbrella protective orders are likely to take place, there are frequently public interest organizations (or third-party payors) who are interested in challenging confidentiality. The protective order should be crafted to facilitate the prompt resolution of such challenges. Providing an outlet for legitimate challenges to documents' confidentiality will reduce the incentive for third-parties to make an end-run around the protective orders' obligations.

Third, the requirements relating to the production of protected documents should be made unambiguous. In the *Zyprexa* case, the leakers argued that Lilly was given sufficient notice, and the protective order itself did not provide a bright line as to what notice was required.<sup>183</sup> While any actual litigation over the ensuing disputes need not have specific timelines laid out, a specific and

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182. WEINSTEIN, *supra* note 27.

183. The use of the amended subpoena, and the failure to notify Lilly of that subpoena, properly doomed that argument. But had Egilman and Gottstein waited for the date on the original subpoena to produce the documents, there still could have been an open question about whether sufficient notice was given.



reasonable number of days for challenges to subpoenas seems like an obvious and low-cost reform.

Finally, and perhaps more importantly, violation of the protective order needs to have significant penalties to deter future violations.<sup>184</sup> Such penalties should be applicable to all parties and all violations. Thus, if a defendant consistently mis-designates documents in bad faith, sanctions should be explicitly contemplated in the protective order and ordered by the court, with a reasonable opportunity for the producing party to de-designate documents.<sup>185</sup> Similarly, when a signatory to a protective order violates it by distributing protected documents without following the order's terms, severe sanctions are appropriate. Because the harm from the release cannot be effectively mitigated given the state of technology, the courts need to make serious efforts to prevent the release in the first place. Both scenarios (mis-designation and leaks) are made more likely for the reasons described above, which is why more significant attention is needed.<sup>186</sup>

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184. Indeed, Dr. Egilman's settlement and payment of \$100,000 may have itself deterred another leaker. A New Jersey journalist who covers the pharmaceutical industry told me in an e-mail that he had heard, by way of an intermediary, about a litigation expert who was considering leaking documents in another mass tort litigation, but was waiting to see what happened to Egilman. As of this writing, he has not heard anything more from that potential source. E-mail from Edward Silverman, Journalist, *New Jersey Star Ledger*, to author (Sept. 10, 2007) (on file with author).

185. "Bad faith" is not a terribly precise term, but it is a term that courts use regularly. Indeed, it is commonly already required in evaluating claims for sanctions. See *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 425 (E.D.N.Y. 2007) (discussing order relating to Cooper Tire document disclosure). Trivial—even if frequent—mis-designations (e.g., designating newspaper articles as confidential) should not trigger any bad faith findings. Instead, the focus should be on those mis-designations that appear to be directed solely at avoiding public knowledge of information that is not properly confidential. As noted in the text, the protective order should give the designating party an opportunity to de-designate documents prior to any sanctions proceedings taking place, and, unless other evidence suggests intentional misconduct, de-designation should eliminate the need for sanctions.

I am not oblivious to the costs that are incurred in the designation process, and the risks of over-designation are likely smaller than those of under-designation. That said, the concerns that important information might remain secret for no good reason are legitimate. This approach—in particular given the opportunity to de-designate documents—seems reasonable given these concerns.

186. Judge Weinstein, in correspondence, writes, "Generally I am opposed to sanctions, which lead to collateral litigation and ill-will among those who

In any such case, with an appropriate showing, courts should be open to sanctioning not just the individuals in question (whether experts or clients), but also counsel. If it is shown that an attorney was either involved with or knowingly permitted such a violation to occur, the attorney should be sanctioned accordingly. Clients and experts are frequently one-time players, and their sanction (and even their removal from the litigation) may be a price that an attorney would consider acceptable in order to achieve a higher overall value. Including the possibility of individual sanctions may change that calculus. Given the fact that such conduct is facilitating the violation of a court order, this should not be a particularly controversial idea.<sup>187</sup>

#### IV. CONCLUSION

To return to a theme established above, various electronic communication technologies—whether as mundane as e-mail or as complex as the Tor network of document distribution—have changed many of the assumptions inherent in modern protective order practice. These technologies have made violations of protective orders (some innocent and some intentional) more likely, and have made the impact of those violations impossible to contain. In order to further the goals established by the creation of umbrella protective orders in the first place, courts need to make certain changes in those orders' scope. When the bell cannot be unringed, it is far more important to prevent its improper ringing in the first place. So doing will at once help prevent the improper release of

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should be working together to reduce litigation tension, and which seldom have a deterrent effect. The Rule 11 fiasco is illustrative." Letter from Judge Jack Weinstein to author (Nov. 29, 2007) (on file with author). I share Judge Weinstein's general reluctance to use sanctions frequently, but I emphasize that my proposal focuses primarily on experts—people as to whom sanctions (particularly if expressly contemplated within the protective order endorsement) may well be effective.

187. It is worth noting that the evidence in the Zyprexa litigation does *not* suggest that any of the attorneys involved in the products liability litigation were aware of the efforts to avoid the protective order. Indeed, the lawyers from the Lanier firm evidently immediately terminated the retention of Dr. Egilman and cooperated in discovery in connection with the document leak. Transcript of Hearing Before Hon. Jack Weinstein, *supra* note 81, at 200.

confidential documents *and* create a clearer path to the release of important non-confidential documents that can impact public health.